BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONNA HATTON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,025,423
CESSNA AIRCRAFT COMPANY	)	
Self-Insured Respondent	)	

ORDER

Claimant appealed the March 21, 2007, Award entered by Administrative Law Judge Thomas Klein. At the parties' request, the Board cancelled the oral argument that was scheduled for July 20, 2007, and placed this appeal on the Board's summary docket for disposition.

APPEARANCES

Stephen J. Jones of Wichita, Kansas, appeared for claimant. Dallas L. Rakestraw of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges she injured her back working for respondent due to a series of traumas she sustained from January 10, 2005, through August 1, 2005, which was the last day she worked for respondent. In the March 21, 2007, Award, Judge Klein noted the parties stipulated the appropriate date of accident for this alleged series of traumas was on or about January 12, 2005. Additionally, the parties also stipulated claimant's back injury arose out of and in the course of her employment with respondent.

The only issue presented in this appeal is the nature and extent of claimant's injury and disability. In the March 21, 2007, Award, Judge Klein awarded claimant permanent disability benefits under K.S.A. 44-510e for a three percent whole person functional impairment. The Judge denied claimant's request for a work disability (a permanent partial general disability greater than the functional impairment rating) on the basis that claimant had voluntarily terminated her employment with respondent.

Claimant contends Judge Klein erred. She argues her resulting whole person impairment is more than three percent and that she sustained at least a 59 percent work disability. Claimant also argues she did not voluntarily terminate her employment as she was terminated after a misunderstanding over her medical leave. In short, claimant requests the Board to increase her award of permanent partial general disability benefits.

Conversely, respondent argues claimant began taking medical leave in August 2005 for reasons unrelated to her back injury and that she was eventually terminated for failing to provide required 30-day updates. In addition, respondent contends claimant advised its human resources department that she did not plan to return to work for respondent and that she was seeking work with other employers. In essence, respondent contends it provided claimant with an accommodated job and claimant did not make a good faith effort either to retain her employment or to find other appropriate employment. Respondent also argues claimant did not sustain any functional impairment as measured by the fourth edition of the AMA *Guides*[1].

In summary, respondent argues claimant should not receive any permanent disability benefits as she has sustained neither a work disability nor any permanent functional impairment. In the alternative, respondent argues claimant has sustained no more than a one percent whole person impairment and no more than a 15.5 percent work disability, which represents a 31 percent wage loss and a zero percent task loss utilizing the opinions from vocational expert Dan R. Zumalt, Dr. Sandra Barrett and Dr. John P. Estivo.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After considering the entire record and the parties' arguments, the Board finds and concludes, as follows:

Claimant began working for respondent in February 2001 as a sheet metal assembler. In November 2004, claimant's back began bothering her. By early

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

January 2005, claimant was experiencing pain in her back that she attributed to the bending she performed at work. Consequently, claimant sought treatment from her chiropractor. At the chiropractor's office, claimant had difficulty getting up from the massage table. Claimant missed work the next day because of her back symptoms.

Claimant reported her back complaints to respondent and was scheduled to see Dr. John P. Estivo. Respondent's medical department also told claimant to continue to work but to exercise care. Consequently, despite experiencing ongoing back and hip pain, claimant continued to work until the end of January 2005, when she experienced a severe flare-up of back pain. Respondent's medical department then injected claimant's buttocks, prescribed medication, and gave her work restrictions.

On January 24, 2005, claimant began treating with Dr. Estivo, who administered more injections and who prescribed physical therapy, which was actually provided at respondent's manufacturing plant. Claimant's back improved. And when her back had reached a plateau, Dr. Estivo referred her for a functional capacity evaluation (FCE). The doctor released claimant from treatment in March 2005 and claimant underwent the FCE the next month.

Following the FCE, claimant returned to her sheet metal assembly job on the 208 line under the recommendations set forth in the evaluation report. Claimant was able to perform her job as a co-worker aided her by lifting the heavier items. Claimant worked with that accommodation until shortly after July 4, 2005, when she was transferred to a different line, the CJ-1 line, which was responsible for working on the center tank area of an airplane. Claimant felt the new job was much more physically demanding than her former position. She described the difference in the two jobs, as follows:

> Q. (Mr. Jones) And what is the difference between those two lines in the way of physical activities?
>
> A. (Claimant) For me, it was a difference between night and day.
>
> Q. I just mean I want to know what you had to do.
>
> A. On the 208 line, I felt like everything was in moderation. And it wasn't as repetitive and I didn't do the twisting or the amount of overhead work that I was going to have to be doing on the center tank line.
>
> Q. Did it involve heavier weights and so on than the center tank *[sic]* line would?

> A. Yeah, to the degree of, you know, I was having to buck a lot more. The bucking bars were heavier.[2]

Claimant advised her supervisor, John Henson, about the difficulties she was having performing her new job duties on the center tank line and she was advised the job would be evaluated. Claimant attempted to perform the work for about a week, but it bothered her back. Consequently, Mr. Henson then sent claimant temporarily to perform light electrical work, which was performed at a bench.

According to claimant, she did not know her sheet metal job on the CJ-1 line was ever evaluated. She testified she was never notified of the evaluation either before or after it was allegedly performed. Moreover, she never met with Dr. Wilkinson, the company physician, who allegedly evaluated the CJ-1 line job, to explain what problems she was having with her job. Conversely, according to her supervisor and respondent's company records, in late July 2005 Dr. Wilkinson came from respondent's health services department and evaluated the position in light of claimant's restrictions recommended by the FCE. Moreover, Mr. Henson believed claimant could perform the job without violating the FCE restrictions. Mr. Henson testified he met with claimant after Dr. Wilkinson's evaluation and advised her they had determined she was able to perform the CJ-1 line job. Claimant does not recall such a conversation.

Claimant continued working for respondent through August 1, 2005.[3] On August 8, 2005, she began taking leave for what she described as a nervous breakdown. She attributes that mental state to her back pain and of feeling she was on the verge of losing her job. At that point claimant took leave under FMLA (Family Medical Leave Act) for her anxiety and depression.

In December 2005, claimant saw Dr. Sandra Barrett at respondent's request. The doctor prescribed medications and ordered electrodiagnostic nerve studies, which produced normal results. The doctor saw claimant three times before releasing her from medical treatment with restrictions in mid-January 2006. Claimant has not received any medical treatment for her back following her release from Dr. Barrett.

The May 2006 termination

Respondent terminated claimant by letter dated May 17, 2006, which reads, in part:

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[2] Hatton Depo. at 5.

[3] Henson Depo. at 10.

> Our records reflect that you have been off work since August 08, 2005 and you have been placed on a leave of absence. August 18, 2005 you were sent a letter explaining your responsibilities while on leave. One such responsibility is for you to provide the Benefits Department, every 30 days, with a written update from your physician(s) regarding your continued need for medical leave and to request additional time off. Again April 11, 2006 you were sent a letter stating the last 30-day update Cessna had received was January 06, 2006 and requested you provide a new 30-day update. To date, we have not received the required documentation to support your continued need for a leave.
>
> Therefore, effective today, May 17, 2006 your employment with Cessna Aircraft Company is terminated because you failed to submit proper documentation.[4]

Claimant contends she was fired over a misunderstanding about her medical leave. She acknowledges that she was not doing the required follow-up for FMLA leave as she believed that leave had expired.[5] Indeed, claimant testified she had spoken with someone in respondent's human resources department and she, therefore, was expecting to receive papers to extend her leave when she, instead, received her termination letter. According to claimant, she had only two telephone conversations with respondent's human resources department during the period between leaving work in August 2005 and her May 2006 termination but she was calling her foreman on a daily basis advising him that she was still off work. Claimant contends she was confused regarding her leave and "didn't realize I was ever on leave of absence. I thought this whole thing was a FMLA slash workers' comp thing."[6] In short, claimant contends she did not know she was required to submit 30-day medical updates as she thought her leave had expired.[7]

In addition to the May 17, 2006, letter, respondent presented other evidence that established claimant was advised about her responsibilities related to her leave of absence. Penny Gilbert, the manager of respondent's health services department, testified that she and a co-worker, Dana Koehler, telephoned claimant on January 4, 2006, and discussed her leave status and her duties relative to that leave. Ms. Gilbert explained at her deposition that company policy required updates from a physician every 30 days when a worker is out on a block leave.

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[4] R.H. Trans., Cl. Ex. 1.

[5] R.H. Trans. at 82.

[6] Hatton Depo. at 10.

[7] *Id.* at 19.

Dana Koehler, who was respondent's manager of employee relations and compliance during all times relevant to this claim, testified claimant's FMLA leave expired on October 24, 2005. Ms. Koehler also established that on August 18, 2005, claimant was sent a letter that stated claimant was responsible for providing 30-day updates while on medical leave or she could be terminated. The letter read, in part:

> Medical leaves will be equal to the forecasted recuperation or recovery period recommended by your doctor. It is your responsibility to **provide the Leave Department, every 30 days, with a written update from your physician(s)** regarding your continued need for medical leave and to request additional time off. . . . In addition, you are also required to follow your departmental reporting procedures.[8]

And on December 5, 2005, respondent sent claimant another letter concerning claimant's failure to provide the required medical updates. That letter stated:

> Our records reflect that you have been off work since 08/08/2005 and were placed on a leave of absence. On 08/18/2005 you were sent a letter explaining to you what your responsibilities are while you are on leave. One such responsibility is for you to **provide the Leave Department, every 30 days, with a written update from your physician(s)** regarding your continued need for medical leave and to request additional time off. A copy of the original letter sent to you on 08/18/2005 is attached for your reference.
>
> To date, we have received no documentation or communication from you regarding your continued need for medical leave. Please send in a completed 30-day update form within 10 days from the date on this letter.
>
> Please continue to follow up every 30 days while you are out on leave.[9]

Respondent sent a similar letter to claimant on December 12, 2005, and on April 11, 2006. Claimant admits she received the first three letters, but not the April 2006 letter.

In addition, Ms. Koehler testified she had a telephone conversation with claimant in January 2006 about providing the required 30-day medical updates.

On May 10, 2006, Janice M. Clark, who is one of respondent's human resources business partners, spoke with claimant over the telephone to find out why claimant was not submitting the required 30-day medical updates. During that conversation, claimant

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[8] Koehler Depo., Ex. 2.

[9] *Id.*

allegedly advised she was not planning on returning to work for respondent and that she would "let the work comp work itself through" as she planned to contact her attorney.[10] It was after this conversation that Ms. Koehler decided to issue claimant's termination letter.

Claimant began looking for other employment in either March or April 2006, after recovering from a February 2006 hysterectomy, which was before she received her termination letter. Claimant contends she was concerned about being able to retain her job. She testified, in part:

> Well, seeing how I need to make a living and if I could cover my bases and get a job that I didn't have to worry about going to work and hurting my back further and it was a job I was capable of doing, I felt it was in my best interest of me and my kids.[11]

More telling, however, are statements that claimant made in February 2005 that she did not like her job in respondent's plant and that she did not want to return to work there.

> Q. (Mr. Burnett) Let me ask you about the Prairie View visits and I've got those here in these records. February 7, 2005, you told them that you don't like your job at Cessna, don't get to see your children as much as you would like to, didn't want to return to work -- didn't want to work at Cessna. Do you recall telling them that?
>
> A. (Claimant) Not like that, no.
>
> Q. Well, let me ask you straight blank: Did you like your your *[sic]* job at Cessna in February of 2005?
>
> A. The pain I was in, no. In the pain I was in, no, absolutely not.
>
> Q. Was it because you didn't get to see your children enough that, they were staying at your father's -- or at ex-husband's, I should say?
>
> A. No, it was because my back was hurt and I couldn't take care of my kids that I -- that I was so miserable. Everything revolved around my back being hurt.
>
> Q. I understand that's your assertion, but do you have any explanation as to why Prairie View's records don't bear that out?
>
> MR. JONES: I'm going to object to your characterizing the records and they speak for themselves. If you want to put them into the evidence, fine and dandy. If

[10] Clark Depo. at 10.

[11] R.H. Trans. at 68.

> you don't want to put them into evidence, then don't cross-examine her from that, I think it's improper. And don't characterize what they say.
>
> THE COURT: What was the question you're objecting to?
>
> MR. JONES: The characterization of the treatment.
>
> MR. BURNETT: I asked her why Prairie View's records don't reflect that the reason that she was given for her anxiety and depression.
>
> A. You know, usually -- if you want to know my version of why they wrote it like that is because usually when you're depressed and you're in pain and you're going for treatment, you are just blurting out everything that is wrong. This is -- that was everything that was wrong in my life. But if you look at the center of it, the center of it was because I hated my job because I could not *[sic]* no longer do it and I was in constant pain. I was letting the kids go to their dad's because I was in constant pain. I could not pay my bills because I was in constant pain. You know, you don't see it like that, but I'm telling you that's what was going on in my head.[12]

The above supports Ms. Clark's testimony that claimant stated she did not intend to return to work for respondent. Claimant, however, adamantly denies making such statement. Instead, claimant contends they again discussed the need to provide a medical update:

> I basically -- when the FMLA got brought up, I had had my hands and kept that letter about the FMLA being expired. That's when she [Ms. Clark] went on to explain to me the leave of absence. And then as we were clearing all that up, in the meantime, I had said, I was waiting for this work comp case to work itself through only because I thought that's when I would be released to go back to work. And she said regardless, I needed to get in this 30-day letter. And I says, well, I had no problem doing that, that I would do that.
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> . . . And in that conversation is when she said, you know, Donna, I will be sending you the paperwork. I assume that paperwork was stuff I needed to take to the doctors with me.[13]

Claimant believes the above conversation occurred around May 15, 2006. But before making it to the doctor, claimant received her termination letter.

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[12] *Id.* at 62-64.

[13] Hatton Depo. at 12, 13.

Based upon the above, the Board finds the evidence overwhelming that claimant did not intend to return to work for respondent and that she did not comply with respondent's requirements to provide 30-day medical updates. Furthermore, claimant's testimony regarding her termination establishes that she is not entirely forthright. In short, the Board finds claimant did not make a good faith effort to retain her employment with respondent.

New employment

When claimant testified at her regular hearing in August 2006, she was living in Goessel, Kansas. Consequently, she had been looking for employment in the Newton and Goessel areas. By late August 2006, claimant had applied for numerous jobs including an assistant manager position with a Dollar Tree store, a paraprofessional position at a middle school, a paraprofessional position at a high school, a receptionist at a car dealership, an unspecified position at a drapery store, an administrative position with a movie theater, and a juvenile intake officer position. But the only employment claimant had obtained between the time she last worked for respondent in early August 2005 through August 2006 was for Mercy Home Care, where she cared for her mother-in-law. Claimant, however, quit that job as the $9 per hour that she earned did not justify her travel expense.[14] The record also indicates that claimant only earned $14 per week.[15] That figure, however, is so low that the Board wonders if claimant misspoke.

At the time of the regular hearing, claimant had been tentatively hired as a juvenile intake officer and she was awaiting the results from a KBI investigation. Claimant believed she would begin that job sometime after Labor Day 2006. The job was a part-time position that would possibly evolve into a full-time job. Claimant did not know how many hours per week she would work but she expected to earn $10 per hour.

Nature and extent of impairment

Dr. John P. Estivo, who is board-certified in orthopedic surgery, began treating claimant in January 2005 and found she had positive straight leg raising findings on the left and some numbness and tingling along the L5 dermatome of her left foot and also some positive findings on the right. The doctor thought claimant had lumbar radiculopathy and left hip strain. The doctor next saw claimant in early February 2005 and she was continuing to experience lumbar spine pain and left leg pain. Left hip and lumbar spine x-rays taken in Dr. Estivo's office were normal. An MRI was essentially normal, but it did

[14] R.H. Trans. at 28, 71.

[15] *Id.* at 28.

show some mild degenerative changes at the L5-S1 intervertebral space. After the early February 2005 visit, the doctor believed claimant had left hip strain, lumbar spine strain, and sacroiliitis.

Claimant saw Dr. Estivo several more times and the doctor noted her findings and symptoms were decreasing. On March 16, 2005, the doctor's diagnosis was lumbar spine strain that was improving. Also on that date, the doctor released claimant from treatment without restrictions, but he also recommended she continue physical therapy exercises at home. Dr. Estivo concluded claimant had no functional impairment under the fourth edition of the AMA *Guides*. In addition, the doctor reviewed a list of claimant's former work tasks, which was prepared by respondent's labor market expert, Dan R. Zumalt, that claimant had performed in the 15-year period before she developed her present back complaints. The doctor concluded claimant could perform all of her former tasks. Nonetheless, at his deposition Dr. Estivo readily admitted he does not know if claimant's back complaints completely resolved after he last saw her in March 2005 or if her symptoms reoccurred when she returned to work. Finally, the doctor testified that as far as he knew claimant had no preexisting functional impairment relative to her back.

Dr. Sandra Barrett was the last doctor to treat claimant's low back. The doctor, who is board-certified both in rehabilitation and physical medicine and electrodiagnostic medicine, first examined claimant on December 22, 2005. The doctor's initial impression was that claimant had low back pain and radiculopathy. Consequently, the doctor recommended an EMG nerve test, placed restrictions on claimant, and gave her medication. The electrodiagnostic test results were considered normal. Dr. Barrett met with claimant the third and final time on January 12, 2006, when they reviewed the results of the EMG. The doctor then gave claimant her permanent work restrictions, which prohibited claimant from lifting more than 50 pounds, limited her to only occasional twisting and turning, and encouraged her to rotate her tasks.

Using the fourth edition of the AMA *Guides*, Dr. Barrett determined claimant had no functional impairment. Furthermore, after reviewing the task list prepared by Mr. Zumalt, the doctor indicated that claimant should not perform four of 29 nonduplicated former work tasks, or approximately 14 percent, when considering those tasks in the context of a full workday at respondent's plant.[16] And according to Mr. Zumalt's task list, those four tasks would require claimant to frequently twist and would prevent claimant from performing

[16] Barrett Depo. at 24, 25.

approximately 75 percent of her sheet metal assembly job.[17] Claimant was referred to Dr. Barrett by respondent.

Claimant presented the testimony of her medical expert, Dr. George G. Fluter. The doctor, who is board-certified in rehabilitation and physical medicine, examined claimant both in October 2005 and May 2006, and diagnosed back pain, myofascial pain affecting the lower back, and bilateral lower extremity pain. Moreover, the doctor determined claimant had an eight percent whole person functional impairment as he believed claimant's condition fell between DRE (Diagnosis-Related Estimates) Category II and Category III as set forth in the fourth edition of the AMA *Guides*. In his May 8, 2006, letter to claimant's attorney, the doctor explained how he analyzed claimant's impairment.

> The following impairment rating is calculated using appropriate sections of the AMA's *Guides to the Evaluation of Permanent Impairment*, Fourth Edition.
>
> Using table 75 (page 3/113), there is a permanent partial impairment to the whole body of at least 5% in accordance with II.B. for the lumbar spine. This impairment would be combined with impairments for deficits in lumbar range of motion, strength, and sensation. However, lumbar range of motion was not measured in this case.
>
> Using this information in conjunction with information contained in table 72 (page 3/110), Ms. Hatton's impairment falls between DRE lumbosacral spine impairment categories II and III. Given the clinical information, it is my opinion that DRE impairment category II underestimates Ms. Hatton's impairment and DRE impairment category III overestimates it. Therefore, in my opinion, there is a permanent partial impairment to the whole body of 8% (7.5% rounded up to the nearest whole number) related to the lumbar spine.[18]

In addition, Dr. Fluter also concluded claimant should restrict her lifting, carrying, pushing, and pulling to 20 pounds occasionally and 10 pounds frequently; restrict her bending, stooping, and twisting to a frequent basis; and avoid prolonged sitting, standing, and walking. In light of those restrictions and excluding duplicate job tasks, the doctor determined claimant had lost the ability to perform 32 of 47 former tasks, or approximately 68 percent. The task list Dr. Fluter considered was prepared by claimant's labor market expert, Jerry D. Hardin.

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[17] See *Haywood v. Cessna Aircraft Co.*, 31 Kan. App. 2d 934, 79 P.3d 179 (2002), wherein the Kansas Court of Appeals held, in essence, that task loss is to be determined by considering the individual work tasks in the context of the entire job.

[18] Fluter Depo., Ex. 2 at 3.

November 2004 was not the first time claimant had experienced low back pain. Likewise, this is not the first time that claimant's mental condition has become problematic. Claimant required mental health treatment in 1991 and in 1999 she was diagnosed as having panic disorder. In 2001, claimant was diagnosed with anxiety after ripping out some of her hair with a drill at work. Regarding her low back, claimant had low back pain in approximately 1997 after a sneezing incident. An MRI performed at that time indicated claimant had either a herniated or protruding disk between the fifth lumbar and first sacral (L5-S1) intervertebral levels. Following the sneezing incident, claimant occasionally experienced low back pain, but the pain always resolved. Dr. Fluter's testimony establishes that claimant's preexisting low back condition more probably than not comprised a five percent whole person impairment as measured by the fourth edition of the AMA *Guides*.

After excluding five percent for her preexisting low back condition, the Board finds claimant has sustained a one percent whole person impairment due to the low back injury she sustained working for respondent.

The principal issue in this claim is whether claimant is entitled to receive any permanent partial disability benefits greater than her whole person functional impairment rating. Judge Klein determined she did not. And the Board agrees.

K.S.A. 44-510e sets forth the formula for permanent partial general disability. Reading that statute, one would conclude that permanent partial general disability is determined by merely considering an injured worker's task loss and wage loss. But that statute must be read in light of *Foulk*[19] and *Copeland*.[20] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as created by K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wage being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.

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[19] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). But see *Graham v. Dokter Trucking Group*, ___ Kan. ___, 161 P.3d 695 (2007), in which the Kansas Supreme Court held, in construing K.S.A. 44-510e, the language regarding the wage loss prong of the permanent disability formula was plain and unambiguous and, therefore, should be applied according to its express language and that the Court will neither speculate on legislative intent nor add something not there.

[20] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

Moreover, in *Mahan*[21], the Court of Appeals held that when injured workers fail to make a good faith effort to retain their current employment, *any* showing of the potential for accommodated work at the same or similar wage rate precludes an award for work disability.

> We hold that where the employee has failed to make a good faith effort to retain his or her current employment, a showing of the *potential* for accommodation at the same or similar wage rate precludes an award for work disability. It would be unfair under circumstances where the employee has refused to make himself or herself eligible for reemployment to require the employer to show that the employee was specifically *offered* accommodated employment at the same or similar wage rate.[22]

Following *Mahan*, the Board finds claimant's permanent disability benefits should be limited to her one percent functional impairment rating. Respondent demonstrated its practice to accommodate injured workers when it tried to place claimant in an appropriate job in July 2005. At that time, claimant reported difficulty performing her job on the CJ-1 line. Consequently, respondent moved claimant to the lighter job where she worked on electrical parts at a bench. In addition, respondent requested the company physician to evaluate claimant's job to determine if it was within the recommendations of the FCE that had been performed. There is no reason to doubt that respondent would have attempted to accommodate claimant's injuries had she attempted to return to work following her medical leave.

The Board concludes the March 21, 2007, Award should be modified to award claimant a one percent permanent partial general disability based upon her whole person functional impairment rating.

AWARD

WHEREFORE, the Board modifies the March 21, 2007, Award as follows:

Donna Hatton is granted compensation from Cessna Aircraft Company for an accident on or about January 12, 2005, and the resulting disability. Based upon an average weekly wage of $933.26, Ms. Hatton is entitled to receive 4.15 weeks of permanent partial general disability benefits at $449 per week, or $1,863.35, for a one

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[21] *Mahan v. Clarkson Constr. Co.*, 36 Kan. App. 2d 317, 138 P.3d 790, *rev. denied* 282 Kan. ___ (2006).

[22] *Id.* at 321.

percent permanent partial general disability, making a total award of $1,863.35, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority. Because Dr. Barrett was selected by respondent, I find her testimony credible that claimant should observe permanent work restrictions and, more importantly, that claimant has sustained a 14 percent task loss. There is no question that the tasks claimant lost due to her low back injury prevent her from performing her sheet metal job. That is clearly established by the testimonies of Dr. Barrett and respondent's vocational expert, Mr. Zumalt. Consequently, claimant has sustained a significant loss regarding her ability to return to work at comparable pay.

I disagree with the majority as *Mahan* is not applicable to these facts. Before *Mahan* is applicable, there must be evidence there is a potential the injured worker could return to work with his or her employer and earn a comparable wage. But that evidence is lacking. There is no evidence in this record that respondent could and would accommodate, or potentially accommodate, claimant's permanent work restrictions had she retained her employment.

I agree that claimant did not exert a good faith effort to retain her job with respondent. But because *Mahan* is not applicable, the proper analysis in this claim is to determine claimant's task loss and wage loss under *Foulk* and its progeny. Only then can claimant's permanent disability benefits be determined.

BOARD MEMBER

c: Stephen J. Jones, Attorney for Claimant
Dallas L. Rakestraw, Attorney for Respondent
Thomas Klein, Administrative Law Judge